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Do Asian Nations Take Intellectual Property Rights Seriously?

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Abstract

The paper discerns three main tendencies in current Asian IP law: an attempt by nations to keep abreast of any additional demands of the industrial powers and to introduce all manners of new laws or revision of old ones considered to be important for foreign investors; a continuation of Asian reluctance to confront foreign nations (chiefly the US and EU) as regards the forms and contents as well as enforcement of such laws; a desire to keep costs of the IP system down and help local businesses benefit from better access to such a system.

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1. Introduction

Nowadays, no media report is complete without a story relating to intellectual property (IP) featuring prominently and competing for attention among the welter of current news and views. IP developments in single countries, regions or around the globe are recorded continuously and in detail by all sorts of media outlets. Some of the electronic media engage entirely in reporting IP-related events and activities on a daily basis.

Amidst the multiplicity of IP resources and volume of information they release, one indubitable fact stands out. Whether by design or unconsciously, confirmation of the ascent of countries in global, economic league tables seems to be announced through the appearance of repeated news of their ill-deeds in the IP field. A Japanese study thus commented, "In connection with the advancement of industrial technology in China, Taiwan, Korea and other places in the Asian Region, infringements of not only the trademark and design rights but even infringements of patent rights are increasing."¹ Ironically, it has become a rare feat for such countries and similar ones in the rest of the world to receive a welcoming review of their efforts to introduce more IP law and implement them. Indeed, reports of any changes in IP among the newly industrialising nations, such as those in Asia, are thus replete with calumny and backhanded attacks of deficiencies and wilful dereliction of obligations on their part. The Intellectual Property Task Force created by the US Justice Department in 2004 thus commented,

While developing countries in Asia have increased their manufacturing capacity for legitimate goods, the region has also become a major manufacturer of counterfeit products. Factories in China, Taiwan, and Hong Kong produce numerous counterfeit designer goods and other products protected by United States trademarks. Factories in Singapore and Thailand produce large amounts of counterfeit software and movies that are exported to the United States, sometimes before the films are released to the general public. Consequently, many intellectual property offences in the United States are traced to manufacturing plants and bank accounts in Asia. In fact the United States Trade Representative has identified several Southeast Asian countries, such as China, Malaysia, Thailand, Taiwan, Indonesia, and the Philippines as countries that do not adequately or effectively protect intellectual property rights.²

Such a scathing critique that denies any positive progress in Southeast Asia may be puzzling, even a shock, to many, not least in governments and academia across Asia. Yet, accounts of IP laws and practices in Asia in the regular press as well as the learned journals in the West barely relate to the economic and social upheavals that lie in the background. Instead, a self-serving comparison is played up before the reader, namely between 'deficiency' in enforcement of laws in these countries and the (presumably 'exemplary'?) practice in Western Europe and North America to suggest the pointlessness of having the laws in the first place. The uninformed observer might even be persuaded to think that the situation must have got worse as the years went by.

¹ Japan Patent Office, *FY2004 Survey Report on Losses Caused by Counterfeiting*, March 2005. Available at <http://www.jpo.go.jp>.

² See, US Justice Department, Office of the Attorney General, *Report of the Department of Justice's Task Force on Intellectual Property*, October 2004, at 32.

Undoubtedly, the story of IP law making and implementation in Asia has not always been glorious. For that matter, neither have other countries (Germany, USA and Switzerland, among them) demonstrated anything to the contrary while pursuing their respective goals of achieving industrialisation and social progress in past centuries. Still, painting a gloomy picture of Asian IP, usually in the interest of foreign proprietors, or denying any of its deficiencies, as happens with some domestic political and economic interests in Asia, will fail to explain adequately the paradox of more laws being placed on their statute books while, as constantly claimed by their critics, there might be less progress in their implementation. A more sound approach would appear to us to be an assessment of the state of IP law in Asia or elsewhere by reference, principally, to the internal factors that necessitated its emergence and continue to define or redefine it. This paper attempts to examine recent developments in IP law Asia with such an approach.

The paper discerns three main tendencies in current Asian IP law: an attempt by nations to keep abreast of any additional demands of the industrial powers and to introduce all manners of new laws or revision of old ones considered to be important for foreign investors; a continuation of Asian reluctance to confront foreign nations (chiefly the US and EU) as regards the forms and contents as well as enforcement of such laws; a desire to keep costs of the IP system down and help local businesses benefit from better access to such a system. Each of these tendencies will be addressed in subsequent sections 1 to 3, respectively. Section 4 will address the inevitable question of the likely course of future developments. The paper concludes that foreign, particularly US, criticism and attendant heavy-handed moves to compel Asian nations to implement IP laws are being viewed, more and more, through Asian eyes, as crossing the boundaries of propriety and might easily backfire.

2. Laws Galore but Instability Persists

Although nearly all the Asian nations have declared the compliance of their laws with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), they continue to promulgate new laws or amend old versions.³ For reasons of space, we will confine ourselves to three countries, namely South Korea, Taiwan and Singapore. South Korea amended its Copyright Act in 2003 to incorporate changes prompted by the WIPO Copyright Treaty and joined the latter in June 2004. It also joined the Trademark Law Treaty in February 2003 as well as the Madrid Protocol in April 2003. In October 2004, it agreed to take part in the U.S. Strategy Targeting Organized Piracy (STOP!). South Korea again amended its copyright-related laws in January 2005, among other things, extending exclusive transmission rights to sound recording producers and performers. Taiwan amended all its laws in 2003 but did the same again to its patent law in July 2004 and to its copyright law in August 2004. In January 2005, Taiwan's legislature passed a law that protects pharmaceutical test data for new drugs for five years. Singapore also amended its laws on patents, trademarks and plant varieties protection in July 2004 and its copyright law in January 2005. Singapore joined the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty on April 17, 2005.

³ See, Asia-Pacific Economic Cooperation, "IPR Policy Progress Mapping and Follow-up Report on "Comprehensive Strategy on IPR in APEC", submitted by Japan to the 20th Intellectual Property Experts' Group Meeting, Seoul, Korea, 22-23 February 2005.

This phenomenon of unstoppable IP law making characteristic of most Asian nations over the last decade has resulted from a straightforward cause. Asian nations have for long behaved as if the question of whether they should add more IP laws to those they already possess was out of their hands. This was a reflection, in large measure, of their huge dependence on the industrial powers of the US, EU and Japan for their exports and source of foreign investment. Indeed, Asian nations raced against each other to embrace any laws and measures thrown at them by the US or, to a lesser extent, the EU and Japan. Nations that showed any semblance of doubt in the permanent transplant of IP law or, even, attempted to buck the trend were viewed by the industrial powers as prevaricating or heretical. The upshot of this has been the growing number of nations that deeply resent the avalanche of foreign IP law placed on their statute books but do not speak out in public against it or demonstrate their desire to stop it.

In spite of the growing resentments, often expressed only through the local print media, the US, Europe and Japan maintain that any scrutiny into the existing IP system to make it more responsive to local conditions will lead to dilution of that system and therefore remain adamant that no changes of that nature should be allowed. The US in particular has been engaged in a new round of bilateral agreements (known as 'free trade' agreements, or FTAs) with developing countries across the world to lock those countries into an IP regime modelled very much on its own domestic laws. However, even those nations that have signed up to an FTA with the US are not exempt from further pressures. Thus the International Intellectual Property Alliance had cause to be annoyed with Singapore's choice to allow parallel imports and to seek to reverse it:

[T]he relaxation of parallel imports has resulted in an influx into Singapore of pirated product masquerading as legitimate imports. Because of police reluctance to accord priority to such infringement, industry must resort to expensive and lengthy civil litigation in order to keep such pirate products out of the market. The Government of Singapore should reconsider its position on this issue given these changing developments, and should either add an exclusive right to authorize imports, or in the alternative, should, as neighboring countries and territories have done, provide a window of time from the release of a copyright title before allowing parallel imports into the market.⁴

An inevitable consequence of the constant harangue of the US and industry bodies with stakes in global IP is the creation of instability in the Asian IP system, a continuing erosion in the efficacy of even those rules already in place. The plethora of measures proposed each year by the United States Trade Representative (USTR) and the International Intellectual Property Alliance (IIPA) are suggestive not only of the liberty they take with the affairs of other nations but also of the little respect they have for the institutions and efforts of others. Thus, for instance, addressing Indonesia, the IIPA commanded: "To ensure that adequate resources are devoted to the piracy problem on a year-round basis, the President must sign and implement the National

⁴ See, International Intellectual Property Alliance, *2006 Special 301 Report*, February 13, 2006, available at <http://www.iipa.com>.

Task Force Decree, and assign sufficient numbers of officers to tackle copyright piracy and bring piracy rates down."⁵ As regards Taiwan's efforts, after acknowledging that disappearance of pirated optical disks and "illegal factory production", the same organization commented, "Taiwan continues, however, to be world's largest supplier of blank recordable media to pirate operations globally and, to date, Taiwan has not prosecuted factories that "knowingly" supply blank product to affiliate pirate operations abroad."⁶ The IIPA declared similarly

"By the end of 2005, China must

- Through amended copyright legislation or regulations, correct the deficiencies in China's implementation of the WCT and WPPT, and ratify the two treaties.
- Significantly ease evidentiary burdens in civil cases, including establishing a presumption with respect to subsistence and ownership of copyright and, ideally, permitting use of a U.S. copyright certificate, and ensure that evidentiary requirements are consistently applied by judges and are available in a transparent manner to litigants.

Each of the measures noted above is necessary to strengthen China's intellectual property enforcement regime. The true test, however, is the impact of China's actions and policies on U.S. sales and exports of copyrighted works."⁷

The frustration of Asian nations with the high-handed manner of the industrial powers and allied institutions in their unrelenting drive to impose layers upon layers of IP laws and measures on them has surfaced from time to time. Koreans were recently vocal about the potential impact of opening to foreign proprietors further access to the local film industry.⁸ One prominent film actor was reported as saying, "South Korean movies will now walk the path toward collapse without measures to guard against Hollywood's dominance".⁹ Public demonstrations of "some 1,500 South Korean movie producers, actors and directors" with placards reading, "Stop humiliating negotiations that will allow a cultural invasion",¹⁰ took centre stage in the debate over whether the domestic film industry could withstand competition from Hollywood. The South Korean government, on the other hand, iterated, "The current situation is that we cannot survive unless joining the worldwide free trade trend and that has frequently demanded our screen quota system be changed."¹¹ Clearly the government

⁵ *Ibid.*

⁶ See, International Intellectual Property Alliance, *2005 Special 301 Report*; available at <http://www.iipa.com>.

⁷ *Ibid.*

⁸ South Korea apparently required local cinemas, from as far back as 1966, to show local movies for 146 days a year. As part of ongoing negotiations with South Korea for a free trade agreement, the US had pushed for a reduction by denouncing "the quota system as an unfair trade practice and major hurdle". The South Korean government subsequently agreed to reduce the restrictions to 73 days a year. See, Jae-Soon Chang, "South Korea cuts homegrown movie quota", Associated Press, Seoul Korea, January 26, 2006; available at <http://www.mercurynews.com>; accessed on 20 February 2006.

⁹ *Ibid.*

¹⁰ See, "Korea anti-Hollywood demos" at <http://p2pnet.net/story/7874>, February 9, 2006; accessed on 20 February 2006.

¹¹ See, note 8, above, *ibid.*

was not oblivious to the looming dangers for the local film industry but sought, just as much as other Asian nations, to factor them into the overall scheme of its engagements with, and dependence on, the US.

2. Shying Away from Confrontation

The attitudes of Asian nations towards post-Doha issues in IP have been arguably embryonic. Even where they were expressed, they

...remained limited to such disjointed aspects as biodiversity, compulsory licensing and extension of protection to geographic indications to cultural or other artefacts in Asia...The obvious lack of a unified perspective across Asian states prevents the emergence of articulate positions on major IP issues that could command broader appeal among governments, civil society, the professional groups and consumers.¹²

When the Friends of Development (FOD), led by Argentina and Brazil, put forward proposals for a 'Development Agenda' for the World Intellectual Property Organisation (WIPO),¹³ one could have guessed that Asian nations would play a peripheral role, just as they had done at Doha in 2001 and since then. Singapore spoke on behalf of the 'Asian group' at the Inter-Sessional Intergovernmental Meeting (IIM) on a Development Agenda for WIPO on the first day (April 11, 2005) expressing support for the proposal and emphasising that "mainstreaming development dimension into all WIPO's work is imperative" and that "IP is not an end in itself." It also spoke against the 'one size fits all approach' as being inappropriate; instead, it asserted that there should be respect for the 'policy space' of developing countries and a weighing of costs of IP against the benefits.¹⁴

When Singapore again addressed the WIPO inter-governmental meeting on a 'development agenda', this time on behalf of the Association of Southeast Asian Nations (ASEAN), it merely iterated, in diplomatic language, support for strengthening WIPO's activities, glossing over the serious issues on the table.¹⁵ It stated, "ASEAN believed that the proposal to establish a Development Agenda offered WIPO an opportunity to explore and identify additional measures, which could strengthen WIPO's role in promoting development and enhancing the development dimension into its work."¹⁶ Indeed, its expression of gratitude towards WIPO for help extended to ASEAN in all manners of activities outweighed any glib support that group extended to the 'development agenda'. Neither did it clearly identify which side of the debate ASEAN sought to stand. Considering the vociferous

¹² See A. Endeshaw, "Asian Perspectives on Post-TRIPs Issues in Intellectual Property" *The Journal of World Intellectual Property*, (Vol.8, No.2, pp.211-235, March 2005).

¹³ WIPO, "Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO", Geneva, August 27, 2004; WO/GA/31/11. The proposal was later elaborated through a further document; see, WIPO, "Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11", Geneva, April 6, 2005; IIM/1/4.

¹⁴ See, the Electronic Frontier Foundation (EFF), Deeplinks, Blogging WIPO's Development Agenda Meeting - Day 1, April 11, 2005; available at <http://www.eff.org>. Accessed on 20 February 2006. See also, WIPO, Inter-sessional Intergovernmental meeting on a development agenda for WIPO: Report, First Session, Geneva, April 11 to 13, 2005; IIM/1/6, July 31, 2005, at paragraph 40.

¹⁵ See, WIPO, note 14, above, *ibid.*, at paragraph 41.

¹⁶ *Ibid.*

statements made by the Philippines and Myanmar at Cancun,¹⁷ it makes one wonder whether those countries had changed stance in the short time since then.

The Singapore delegation itself expressed something different from the view it stated on behalf of Asia. It asserted,

*...a development dimension had always been an integral part of the Organization [WIPO] since its incorporation into the family of the UN agencies in 1974...[and that] WIPO possessed the competence and initiative to measure up to this task in a transparent and effective manner within its existing mandate. Hence, it did not see the need to change the WIPO convention, nor establish new procedures or bodies to integrate the development dimension into the work of the Organization.*¹⁸

Needless to say, all of this echoed the US proposal which Singapore viewed "could help WIPO to sharpen the focus of its cooperation for development projects."¹⁹ One must note here that the US position was antithetical to that of the FOD and Singapore's association with that position ran counter to its statement on behalf of Asia.

Indonesia stated quite bluntly its gratitude to the WIPO for helping it develop the IP system in Indonesia and for its technical assistance though it also quipped that "intellectual property alone could only contribute to providing part of the solution."²⁰ South Korea affirmed that "intellectual property would increasingly become important in the development strategies of all countries" but confined itself to a call for "the rational use of resources...to avoid a negative impact on the budget of the parties involved."²¹ In short, it did not find anything worth changing both in the activities of WIPO or the IP system as a whole.

China initially demonstrated that same tendency of looking on while others battled for or against the status quo in IP. In the first session of the inter-governmental deliberations mentioned above, the Chinese delegation pointed out, "WIPO's concern about development" should not be confined to technical assistance;²² that "in identifying priorities and setting-up of IP norms, WIPO would fully take development into account" as well as "the real capacity of Member States".²³ During the second session, China declared some support for the proposals of the FOD indirectly by citing approvingly the explanations offered by the FOD.²⁴ Thus it referred to the pressure brought to bear on countries during multilateral or bilateral trade talks to

¹⁷ See Endeshaw, at note 12, above., *ibid.*

¹⁸ See, WIPO, note 14, above, *ibid.*, at paragraph 90.

¹⁹ *Ibid.*

²⁰ *Ibid.*, at paragraph 93.

²¹ WIPO, Inter-sessional Intergovernmental meeting on a development agenda for WIPO: Report, Second Session, Geneva, June 20 to 22, 2005; IIM/2/10, September 1, 2005; at paragraph 40.

²² See, WIPO, note 14, above, *ibid.*, at paragraph 52,

²³ *Ibid.*

²⁴ See, WIPO, note 21, above, *ibid.*, at paragraph 191.

accede to TRIPs plus provisions to point to the impact of norm-setting activities in WIPO on developing countries. It added, "it supported more norm-setting activities in WIPO, including those harmonization activities for the purpose of encouraging innovation."²⁵ It sought to push for application of "the concept of users in norm-setting activities" with a view to including all parties and not just rights holders.²⁶ In the end, China remained uncommitted to the contents of the proposals of the FOD, seeking instead to speak on a single aspect of the deliberations, even then making a dubious point without taking sides or seeming to support any of the protagonists.

When Thailand spoke at the second session of the WIPO intergovernmental meeting, on behalf of the ASEAN group, it iterated what Singapore had stated on behalf of ASEAN during the first session.²⁷ Thailand simply repeated that "development had always been an important aspect of WIPO's work" and expressed its gratitude towards WIPO's assistance.²⁸ It declared, "[t]he Development Agenda offered WIPO the opportunity to further enhance and strengthen its role in promoting development and contribute to the realization of the millennium development goals."²⁹

In the end, with the exception of India,³⁰ which declared its full support for the proposal of the FOD, no country from Asia openly embraced that proposal, least of all formally join the ranks of the FOD. Considering the long-standing Asian practice of quietly acceding to the demands of the industrial powers to expand the type and scope of IP they adopted as well as enforce it, it may come as no surprise that no Asian nation portrayed itself as part of the general movement of developing countries to claim a 'policy space' for themselves.

On the other hand, as would be expected, Japan was forthright in its support for the US and other industrial powers which maintained that no new 'dimension' would be necessary for WIPO as it has always played that role.³¹ Japan expressed its support for improving the technical cooperation and capacity building activities of the WIPO in much the same way as the US, UK and other countries had commented. Remarkably, Japan did not explicitly reject the proposals of the FOD; it skirted around them by iterating such standard statements as the need to increase "awareness of intellectual property systems" to enhance "the effectiveness of WIPO's activities related to development."³²

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*, at paragraph 28.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Statement by Debabrata SAHA, Deputy Permanent Representative of India [at the United Nations, Geneva], October 1, 2004; available at www.cptech.org/ip/wipo/india10012004.html; accessed on January 31, 2006.

³¹ See, WIPO, note 14, above, *ibid.*, at paragraph 45

³² *Ibid.*

3. Building the IP Infrastructure

Until very recently, the institutional trappings of IP implementation and enforcement in Asia had not received adequate attention. The promulgation of laws was not often accompanied by the creation of institutions, other than the traditional registries of patents and trademarks, that could realise the potentials of IP to transform the economic and technological conditions of the respective nations. This was simply because the widely assumed role of IP as a means of attracting foreign technology and capital was perceived to have been achieved as soon as the laws were promulgated and registration offices opened their doors to discharge their routine functions. That perception has changed in recent years to such an extent that countries have swung around to experimenting with all kinds of formulae they believe to be expediting the exploitation of the innovations protected by the respective laws. Thus, there was a proposal in China for establishing a separate ministry to spearhead IP protection.³³ The use of the IP infrastructure as a means of generating resources to self-finance related activities has become a subject of sets of plans and operations. Singapore took the more ambitious stance of committing itself "to developing into a regional and global hub for the creation, commercialization and management of IP as part of its work-plan for the future."³⁴ Malaysia has also embarked on transforming the administration of IP into a self-financing enterprise thereby offloading a basic function of the state.

In terms of improving the efficiency of the administration of IP, the deployment of electronic means has become a growing trend in Asia. Singapore has introduced such from 2003. By 2004, Hong Kong had implemented electronic filing and publication for trademarks as well as patents and designs. China has done the same from March 12, 2004. Taiwan and Thailand have all introduced electronic searches and plan to implement application systems as well.

Public education is another aspect of the institutionalisation of IP in Asia. The creation of public awareness of IP rights has become one of the major themes of activity, whether by government departments, the local IP offices or international agencies and interest groups. This happens all the time and across many Asian countries³⁵ though the form and frequency of such activities widely differ.³⁶ In any case, an ethical dimension has been injected into the IP discourse in Asia on the apparent premise that legal sanctions alone might not suffice and that attitudes in Asia towards IP need to change to enhance its enforcement in the day-to-day context. Although awareness campaigns will no doubt raise the profile of IP in the society and send the message that illegitimate use will not be tolerated, it cannot be certain that

³³ Dow Jones, Beijing, "China Scholar suggests creating antipiracy Ministry", Dow Jones International News, 26 November 2003; available from Factiva (global.factiva.com), accessed on February 8, 2004.

³⁴ See, Asia-Pacific Economic Cooperation, *Report on the Enforcement Best Practices in APEC Economies to Combat Optical Disk Piracy*, submitted by Singapore to the 21st APEC Intellectual Property Experts' Group Meeting, Manila, Philippines, 2-3 August, 2005.

³⁵ *Ibid.*

³⁶ For Hong Kong, see, Bien Perez, "Educating to counteract software piracy", *South China Morning Post*, 18 November 2003, at 3; available from Factiva (global.factiva.com), accessed on February 8, 2004 (discussing how the IP Department, Customs and Excise and the Business Software Alliance plan to undertake such a campaign).

the general public will be persuaded to be equally sympathetic towards domestic and foreign forms of IP for the simple reason that the latter remain dominant in most parts of Asia.

A further aspect of the institutionalisation process is the emergence across the economically significant countries in Asia (Hong Kong, Taiwan, Thailand, Korea, Malaysia, Philippines and Singapore) from 1999³⁷ of a single coordinating body for enforcement activities. These countries have increased the number of agencies and investigators dealing with enforcement of IP; most of them have also established schemes to pay informers substantial sums in return for information leading to conviction of illegal operators.³⁸ China established, in April 2004, a National Working Group on IP Protection led by Vice Premier Wu Yi and comprising of ministries, agencies and the courts. The expressed aim is to achieve results by "harmonizing the enforcement work between administrative agencies and judicial bodies, streamline giving directives for national crackdown actions and providing public education and propaganda activities."³⁹ The Philippines also established the Philippine Anti-Piracy Team (PAPT) in 2005 to stamp out 'software piracy'. Indonesia is similarly expected to sign into law a National IP Task Force Decree which establishes an inter-departmental task force on IP enforcement comprising of representatives of the relevant government departments.

The US has not viewed such steps as being sufficient and sought to tighten them up further by opening a special office (under an 'Intellectual Property Law Enforcement Coordinator (IPLEC)') in its embassies. On the face of it, establishing an IP Attachés', branches of the FBI or some other outfit in foreign lands might seem a remarkable idea. However, the obvious disregard for national sensitivities, not to say sovereignty, might backfire. The efficiency to be gained in the enforcement of IP rights by flying in foreign experts and investigators might be outweighed by a general feeling of dejection that might set in among local institutions and operatives as well as the public at large.

4. Mixed Signals

In spite of the vociferous demands of the US, and to a lesser extent the EU and Japan, to subject Asia, as a matter of fact all developing countries, to forced marches in adopting and implementing a mirror-image of their domestic IP systems, Asia remains condemned by history and inertia to plod along at its own pace. This has not been part of any wilful plan of Asian governments or discernible by the protagonists of the 'Asian Miracle'. The variety of opposed forces and tendencies at play makes it difficult to arrive upon any easy prognosis of developments.

For instance, local enterprises are beginning to demand enforcement of rights not necessarily to exploit any such rights but simply to preserve their market standing

³⁷ See, Asia-Pacific Economic Cooperation, note 34, above, *ibid*.

³⁸ *Ibid*.

³⁹ See, Asia-Pacific Economic Cooperation, IPR Policy Progress Mapping and Follow-up Report on "Comprehensive Strategy on IPR in APEC", submitted by Japan to the 20th Intellectual Property Experts' Group Meeting, Seoul, Korea, 22-23 February 2005.

from illegitimate producers. This has been very true of the music and film industries. Fake products have also stirred up domestic resentment in another way — Counterfeit medicines have caused deaths and no less an authority than the World Health Organisation has launched a campaign to stamp out such practices in six Asian countries.⁴⁰

In the software industry, however, pirated copies may trigger the opposite reactions to that normally expected. Microsoft reaps benefits from such a practice in China as the market becomes hooked on its products illegally available for practically nothing, rather than purchasing the alternative software developed domestically.⁴¹ In that sense, then, local software developers would find it essential to enforce the existing rights to guarantee their very existence. Conversely too, foreign IP owners would do better by joining forces with local brands and interest groups rather than undermining them. The encouragement of local industry and protection of IP seem to go hand in hand with the extent of protection that foreigners are likely to gain. Any attempt to drive off local brands from the market might have the undesirable consequence of local businesses and (ultimately their governments) washing their hands off the enforcement of the IP system.

On a general level, too, there may appear to be a divergence of Asia from the rest of the world. The reactions of developing nations elsewhere to the inflexibility of Western governments in trying to hold on to the advancing wave of IP harmonisation has not been to abandon any hopes of change or withdraw their demands for a 'policy space' in their law making and implementation. Their incipient but growing movement is generating more sympathy from special interest groups (such as OXFAM and Medicins Sans Frontiers) and the general public in the West. On the other hand, the population and business community in the developing nations increasingly view the state of dissension as a signal of the demerits of the system and its illegitimacy. Curiously, Asia might not appear to manifest such a development.

The more forceful the external pressure directed at Asian nations, the less reticent they have become in initiating measures that could respond to internal demands for change. The more responsive Asian nations were to those pressures and acceded to new laws and measures, the more homogenous and undifferentiated the local laws and practices have become. Indeed, the more pressure has been exerted to force Asia onto the IP bandwagon, the less authoritative and effective the latter have appeared before the populace. Thus US persistence (such as through the FTAs) to turn Asian IP into an identical piece of its own and to subject every decision and practical movement to local detachments of its own enforcement machinery will end as a hollow victory. The deployment of FBI or similar officers to supervise entry and exit ports in Asian countries as well as the passage of overall control to 'Intellectual Property Attachés' or 'Intellectual Property Enforcement Officers' stationed at its foreign embassies⁴²

⁴⁰ "Fakes are for real—But stronger Asian brands may help to combat piracy", *Financial Times*, 13 November 2003, at 12; available from Factiva (global.factiva.com), accessed on February 8, 2004.

⁴¹ *Ibid.*

⁴² The first such appointment was made for Asia when an "Intellectual Property Law Enforcement Coordinator (IPLEC)" was announced on the recommendations of the Intellectual Property Task Force created by the Justice Department in 2004. See, U.S. Department of Justice, News Release, Attorney General Alberto R. Gonzales Announces Appointment of Intellectual Property Law Enforcement Coordinator For Asia, January 5, 2006; available at www.doj.gov. The task of such an officer is "Coordinating investigations and prosecutions of intellectual property offenders located in the region;

will signal the end of any local initiatives in taking responsibility for the making and implementation of laws. This is a slippery path for the US to tread on. Clearly, Asian acquiescence to foreign pressures on the IP front will continue in so far as they are in the grip of economic and geo-political dependence on the US and the other two main industrial powers, the EU and Japan. The US will therefore never receive any signs for when to stop.

Furthermore, developments in IP law in Asia continue to be mediated by non-IP factors. For one thing, the fact that China and the Asian Tigers are displacing manufacturing in the US and EU by products similar in quality but costing less fuels a love and hate relationship. Meeting consumer demands and thus diffusing the concerns of protectionists in the West go hand in hand with the strident voices of those intent on tightening the screws on Asian exporters and extracting any available concessions whether in ordinary trade terms or in IP. While Asian nations have had to cave in to demands of the US to introduce further IP laws through FTAs, the surplus they generate through their exports to the US sustains US budgetary deficit and debts.⁴³

In the mean time, Asian nations are ever on the look out for cushions and support to sustain their drive to maintain and expand export markets. The recent evidence of China taking advantage of distrust between the US and Latin American nations and rising Anti-Americanism to forge business links, create and open up markets, pour in investment in the latter has fomented fear and consternation among US leaders.⁴⁴ While the US is still bogged in expanding and fortifying a pan-American trading bloc, China is creating with Latin American nations economic relationships not coloured by any political ambitions.⁴⁵ China's indiscriminate alliance with all sorts of governments in the developing world, including in Africa, with a view to carving out a trading zone in anything but name, may provide to those nations a space within

Developing relationships with foreign law enforcement agencies and prosecutors in the area; Providing legal and technical assistance to foreign law enforcement agencies on intellectual property enforcement; Assisting federal prosecutors in the United States working on intellectual property cases involving Asia; and Examining intellectual property crime trends in the region." *Ibid.* Attorney General Gonzales added, "Protecting intellectual property rights in the United States and throughout the world is one of the highest priorities of the Department of Justice. "My appointment of an Intellectual Property Law Enforcement Coordinator for Asia is an important step in coordinating enforcement efforts in a critical region of the world." *Ibid.*

⁴³ John Schmid, "Two cars and one view: U.S. taken for a ride" *The Milwaukee Journal Sentinel*, 25 January 2004, 1A; accessed through Factiva on February 7, 2004 (discussing the implications of Chinese increased access to the US market, job losses and why the US has been lax about not taking serious action).

⁴⁴ Saul Landau, "Chinese Influence on the Rise in Latin America", *Foreign Policy in Focus*, June 2005; available at www.fpif.org; accessed on 20 February 2006. Landau writes, "In November 2004, Chinese President Hu Jintao signed 39 commercial agreements with five Latin American nations. Chinese investments in Argentina alone totalled some \$20 billion... At the end of 2004 and the beginning of 2005, China offered more than \$50 billion in investment and credits to countries inside the traditional Monroe Doctrine's shield." *Ibid.*

⁴⁵ "Is Washington Losing Latin America?", *The New York Times*, February 1, 2006; available online at <http://www.nytimes.com>; accessed on 20 February 2006. *The New York Times* commented, "China is still a long way from threatening or even really competing with the influence of the United States in Latin America. But as in other parts of the world, China is pragmatically and aggressively seeking economic and political advantages there." *Ibid.*

which to manoeuvre for better terms and benefits than those offered by the traditional industrial powers. China too is gaining breathing space and an opportunity to reduce its trading dependence on the US as well as possibly stave off strident criticism of its IP.

5. Conclusion

The stance of the industrial powers on Asian IP has evident flaws not only in terms of policy but also in the manner of the absorption of the legal system into the Asian body politic. The apparently overriding foreign concerns of making Asian IP laws into mirror-images of those in the US, Japan and EU as well as moving towards establishing enforcement agencies under the direct control of foreign institutions and government departments will, in the long run, cause incalculable damage to the interests of Western corporations and IP owners. One might indeed sense somewhat of a backlash brewing in Asia against the constant harping of 'piracy' of well-known foreign brands and products⁴⁶ while the state of local innovation remains relatively lower than, and far behind from, those hailing from the EU, US or Japan. Sooner rather than later, this might translate into widespread 'piracy', boycott of 'branded' western goods and the like.⁴⁷

Furthermore, although the debate regarding the rights of sovereign nations to legislate in accordance with their social and economic aspirations is still raging, the nexus between the legitimacy of IP rights and general human rights remains unarticulated in the interest of Asian nations. The industrial nations who rage against the lack of enforcement of IP rights in Asia treat as being of lesser significance the trampling of human rights in general. Indeed, the perception that IP rights can be enforced regardless of the absence or down playing of human rights seems to be a self-serving facade put up by Western powers to look after their corporations ahead of the general interests of Asians and, indeed, of people in developing countries. Clearly such a stance will not endear foreign corporations to Asians over the long term. Enforcement of special rights for foreigners without due regard for the general rights of citizens in

⁴⁶ A very recent case in the UK is the attempt to boycott Coca-Cola by the National Union of Students (NUS) in retaliation for the corporation's unethical practices in Colombia: "It is alleged that The Coca-Cola Company and its bottling partners in Colombia colluded with paramilitaries to murder, intimidate and harass trade union members." See, "Coca-Cola Update", <http://www.nusonline.co.uk>. Coca Cola's sponsorship of the Winter Olympic Games in Turin was a subject of debate when reportedly "two municipal councils in Rome have decided to ban [the Olympic torch] from passing through their streets in protest at what they say is the bad treatment of Coca Cola workers in Colombia. The leaders of the campaign say more than three hundred other councillors across Italy back them." See BBC World Service, "Olympic torch controversy", 7 November, 2005; available at <http://www.bbc.co.uk/worldservice>.

⁴⁷ The practice of boycotting "a company's products in order to make a political statement" is already in full swing, not the least, in the US, in protest against those companies' support for the Republican Party. See, "Consumer guide and brand list for the top 25 Republican Party donors with consumer brands"; available at <http://www.boycottbush.net/consumers.htm>. The particular boycott was initiated by the Ethical Consumer magazine (UK-based) in reaction to the "rejection by President Bush of the Kyoto Agreement on global warming" and because he "continues to be the single biggest obstacle to an intelligent human response to this threat." *Ibid.* See also Mark Tran, "Branded", *Guardian Unlimited blogs*, September 1 2005 (discussing the results of an online opinion poll of 15,500 consumers in 17 countries on major brands and found strong attitudes against Nike, Coca Cola, McDonald's and Nestlé).

Asia not only generates suspicion and hatred but also ends in fomenting opposition to those special rights. Ultimately, the current tendencies of forcing nations into TRIPs plus regimes might have the unfortunate effect of fostering rebellion in the streets and shops of Asia thus robbing the fledgling IP system of any legitimacy it might otherwise have been building up.